

# **MISSOURI CLEAN WATER COMMISSION TELECONFERENCE**

**September 13, 2004**

**Jefferson State Office Building**

**205 Jefferson St.**

**Jefferson City, Missouri**

## **MINUTES**

### Present Via Telephone

Thomas Herrmann, Chairman, Missouri Clean Water Commission  
Davis Minton, Vice-Chairman, Missouri Clean Water Commission  
Paul Hauser, Commissioner, Missouri Clean Water Commission  
Cosette Kelly, Commissioner, Missouri Clean Water Commission  
William Easley, Commissioner, Missouri Clean Water Commission

Doris Bender, City of Independence, Independence, Missouri  
Robert Brundage, Newman, Comley & Ruth, Jefferson City, Missouri  
Gale Carlson, Department of Health, Jefferson City, Missouri  
John DeLashmit, US EPA Region 7, Kansas City, Missouri  
Cindy DiStefano, Missouri Department of Conservation, Columbia, Missouri  
Jack Generaux, US EPA, Kansas City, Missouri  
Ted Heisel, Missouri Coalition for the Environment, St. Louis, Missouri  
Bob Hentges, Missouri Public Utility Alliance, Jefferson City, Missouri  
Leslie Holloway, Missouri Farm Bureau, Jefferson City, Missouri  
Hans Holmberg, Limnotech, Inc., Houlton, Wisconsin  
Angel Kruzen, Sierra Club, Springfield, Missouri  
Mary Lappin, Kansas City MO Water Services, Kansas City, Missouri  
John Lodderhose, St. Louis Metropolitan Sewer District, St. Louis, Missouri  
Susan Myers, St. Louis Metropolitan Sewer District, St. Louis, Missouri  
Kevin Perry, REGFORM, Jefferson City, Missouri  
John Reece, Little Blue Valley Sewer District, Independence, Missouri  
David Shanks, Boeing, St. Louis, Missouri  
Trent Stober, MEC Water Resources, Columbia, Missouri  
Tom Wallace, MEC Water Resources, Columbia, Missouri  
Mary West, City of Moberly, Moberly, Missouri  
Leanna Zweig, Missouri Department of Conservation, Columbia, Missouri

### Present

Randy Asbury, Environmental Resources Coalition, Higbee, Missouri  
Bill Bryan, Attorney General's Office, Jefferson City, Missouri  
Aimee Davenport, Department of Natural Resources, Jefferson City, Missouri  
Mohsen Dkhilli, Department of Natural Resources, Jefferson City, Missouri  
Jim Hull, Department of Natural Resources, Jefferson City, Missouri  
Marlene Kirchner, Department of Natural Resources, Jefferson City, Missouri

Steve McIntosh, Department of Natural Resources, Jefferson City, Missouri  
Kevin Mohammadi, Department of Natural Resources, Jefferson City, Missouri  
Caitlyn Peel, St. Louis Homebuilders Association, St. Louis, Missouri  
Phil Schroeder, Department of Natural Resources, Jefferson City, Missouri  
Becky Shannon, Department of Natural Resources, Jefferson City, Missouri  
Cynthia Smith, Department of Natural Resources, Jefferson City, Missouri  
Steve Taylor, Environmental Resources Coalition, Jefferson City, Missouri  
Scott Totten, Department of Natural Resources, Jefferson City, Missouri  
Abigail Welschmeyer, Environmental Resources Coalition, Wellsville, Missouri

Chairman Thomas Herrmann called the meeting to order at approximately 1:05 p.m.

Use Attainability Analysis (UAA) Draft Protocol

Mr. Jim Hull, Director of the Water Protection Program, reported that the program met with stakeholders twice since the August 4, 2004 Clean Water Commission meeting to reach a consensus on a final draft of the UAA document.

Mr. Phil Schroeder, Chief of the Water Quality Monitoring and Assessment Section, reported the first thing that staff did, per the Commissions' request, was change the document so it would include secondary contact or boating and canoeing as a use to be evaluated within the protocol. The protocol can be used to evaluate whether or not boating and canoeing or secondary contact use is attainable on any classified water and to make a recommendation as to whether or not to remove an existing designated secondary contact or boating use.

Mr. Schroeder explained the comments from the stakeholders' meetings to the Clean Water Commission.

There was a comment regarding the department's earlier recommendation to automatically designate a whole body contact recreation use on streams in urbanized areas. That is something staff took directly out of the Kansas protocol. Through the stakeholder discussions most of the stakeholders found some concern with respect to that, so staff drafted a cautionary paragraph in the protocol. The paragraph states that if it's an urbanized stream, and you are thinking about using the protocol to remove whole body contact recreational use, it requires a very solid analysis. Staff made it clear during their discussions with the stakeholders that it would be difficult to remove a whole body contact recreational use from a stream in an urban area because of the likely chance of contact with that water.

There were comments from stakeholders with regard to the amount of public participation that would be afforded during the process. Staff added further explanation in the document concerning when public participation would be expected or how the public could identify when the department is doing UAAs. Once a UAA is completed, the field work is done, and the recommendation is ready to be made, the department will post that recommendation on its web site. At a later date any changes to use designation

will have to go through rulemaking if that UAA is recommending either the removal of a designated use or the addition of a use in the water quality standards.

Staff and the stakeholders discussed ensuring accountability for the accuracy of the data that's presented in UAAs. It was suggested that the program add a signature block or a way to identify who the person is that's actually making the request to change a use designation. A signature block was added to the form.

There was discussion on quality assurance and quality control measures in order to ensure that the proper processes were followed in doing a UAA. Staff added more detail to the protocol to help explain the process to make sure that any ambiguity was removed to the extent possible. They felt this would assure that the UAAs would be done in a more consistent manner.

There was discussion of the unique nature of the Missouri and Mississippi Rivers because of their size, and how the UAA protocols would apply to those rivers. The department didn't specifically mention these rivers in the UAA protocol although it does apply to them just as it applies to any other water body. There weren't any recommendations to make in terms of changes in the protocol on the basis of those two rivers.

There were discussions about the length of some of the segments that might be recommended for study under a UAA. While there is no limit on how many miles might be contained in a study, staff did add an explanation on the need to have data that is commensurate to the size of the water body. It doesn't have to be the same size as that represented by a water body identification number or the same size of the segments classified under water quality standards, and it could be sub-segmented for the UAA. If a recommendation is received for a use change on a sub-segment of a classified water, staff will break that segment down as they go through the rulemaking.

There was discussion about the potential effect on downstream uses if the upstream use was removed. There weren't any changes to the protocol to try to address that because through the normal permitting process, that type of analysis has to be done anyway.

Staff further explained the process where natural pollutants might be the reason, in combination of other human sources of bacteria, for the use removal. Staff tried to make it clear in the UAA protocol that when a case like that occurs, the person doing the UAA would have to show that the natural sources of bacteria are sufficient to be the cause alone for water quality exceedance in order to be a reason to remove a use.

There was discussion on the phrase "normal flow." Staff were trying to come up with a definition that meant it was a time period where a water body was able to be assessed properly in order to be able to recognize the uses that occur on that water body. Some stakeholders were concerned how that's defined and some were concerned with the word "normal."

Staff explained the depth requirements in how averaging works. The protocol states “Whole Body Contact Recreational Use may be able to be attained if there is a half meter depth average in the water body.” Staff added language that said when you do the averaging, you’re averaging the entire observable water portion. They explained that the depth itself is less important than any evidence of use of that particular water.

For criterion 3, the use of non-remedial human cause conditions is a reason to remove a use, the criterion has been limited to applicability to bacterial controls. Since most facilities have the technology to treat bacteria, staff felt it would be very unlikely to see this criterion used in the removal of a use, however, staff left it in there just in case someone could present some scenario that wasn’t predicted.

For criterion 4, the hydrologic modifications and how that effects the removal of uses, staff clarified that safety is not really a concern with respect to doing UAAs. An unsafe water condition may or may not be used for swimming. There are a lot of cases where safety is not a concern for certain swimmers who get in the body of water. Staff couldn’t come up with any acceptable criteria in the review of safety concerns for use removal.

For criterion 6, social economic impacts, this also has limited applicability to whole body contact recreational use removal because bacteria controls are usually feasible. There may be some cases or temporary times where bacterial treatment may be quite expensive to conduct or to accomplish such as during CSO events, but right now staff doesn’t see too many instances where that might be sufficient reason for use removal. Staff left this option in there in case someone could make a case for that.

There were discussions about stream teams and their presence in waters of the state, and using the waters to assess water quality. Stream team use is protected like any other wading use. Data is now collected where evidence of wading or any secondary contact is shown.

Staff added a flow chart, which includes how the internal review committee works within the process of assessing a UAA. They also added that it would be submitted to EPA as a final action. It’s part of the tri-annual review process. Staff discussed the length of the process, that field reviews may take up to five days to complete, and the internal review committee may require more information during that process.

Staff removed what was once Appendix A, which was a process to compare bacteria levels of one stream to bacteria levels of another stream. It was felt that was not a good fit for this type of protocol.

They discussed issues that deal with the water quality standards that might have some direct impact on how a UAA is done. One is that there is an extra use definition for secondary contact in the rules. The department will be taking a look at that during the rulemaking process of the water quality standards.

They talked about flow augmentation by effluent and how it effects use attainability. It will be addressed in the water classification guidelines that will be presented back to the Commission.

They discussed tiered water quality standards that would address the frequency of use. For example, waters used less frequently where bacteria poses less risk could be given a higher standard.

There was concern with the automatic designation upon the removal of whole body contact recreational use. There was concern with the wording on "reoccurring use." There was a statement that said if the survey indicated one time use of a water body, there would be sufficient criteria to retain whole body contact recreational use or secondary contact. Some stakeholders find that troubling and feel there should be some criteria to determine where infrequency may be a legitimate reason to plainly remove a use. For right now the department hasn't been able to come up with any good criteria so the protocol remains as it is.

Chairman Herrmann referenced page 3, Purpose. "Provide scientifically defensible information" was deleted, as it was included in the version from July 1, 2004. Also there were four bullets in the July 1 version, now there are two. Chairman Herrmann proposed going back to the original July 1 statement of purpose with the addition of the bullet out of the August 27 issue - - Assist in identifying waters of the state which do not support water-contact recreational uses.

Chairman Herrmann stated on page 8, item 7, the first line says "and secondary contact recreation." It is not germane to this use and should be deleted.

Chairman Herrmann stated on page 9, item 12, it says "Storm and flood-water storage and attenuation." He commented if it is taken literally, it could include all of the metropolitan areas now and in recent times that required detention ponds in subdivisions versus just commercial developments to reduce the release water to creeks, stormwater facilities etc. Literal interpretation of this paragraph could include those private detention ponds. Chairman Herrmann did not have any specific recommendation to correct that.

Mr. Schroeder asked Chairman Herrmann if he had any objection to staff looking at the definition and working with the Commission during the rulemaking process and recommending an amendment to the language during that process.

Chairman Herrmann replied it can be clarified if it is interpreted also that the waters of the state which do not include lakes or ponds are totally enclosed in private properties.

Mr. Schroeder stated staff will consider those comments during their rulemaking process and work out some language that might be acceptable to the Commission.

Chairman Herrmann commented on page 10, "Existing uses" "...as those uses actually attained in the water body on or after November 28, 1975,..." He does not know how it was determined what was or was not attainable on November 28, 1975.

Mr. Schroeder replied there could be evidence out there that might be suitable to be able to make a valid decision on. Staff did not know how to further define it other than what is stated, as that language is found in federal guidance.

Chairman Herrmann stated there have been several people who commented on the Automatic Designation of Boating and Canoeing Use, also on page 10. The first sentence is objectionable. The protocol presumes that all waters are at least wadeable. He feels that the entire paragraph is inappropriate.

Mr. Schroeder commented that this is another issue for the rulemaking process by which they can consider changes in the water quality standards to develop a tier of standards that reflect the risk levels. He asked Chairman Herrmann if he has a recommendation for staff on how they would determine if a secondary contact use or boating and canoeing is attained under its proposed definition by the Clean Water Commission?

Chairman Herrmann replied delete the automatic designation and then decide how to attain the boating and canoeing later.

Commissioner Kelly stated she wanted to go on record as objecting to that.

Commissioner Hauser asked if the automatic designation is deleted, how long will it be before they go in with some sort of criteria by which they will be able to protect that interest? He stated they need to be careful about deleting it and not having something to put back in its place. He doesn't like having an automatic designation, but there has to be a clear way to define that interest.

Chairman Herrmann stated he doesn't like automatic designation either, so he would like to delete the paragraph and then think about the depth criteria on page 11.

Mr. Schroeder commented page 11 is the appropriate place in the protocol to talk about depth criteria, and if they want to develop one for secondary contact, or boating and canoeing.

Chairman Herrmann discussed Urban Waters on page 10. There is no definition for unurbanized areas. He suggested deleting "urbanized" and "an urban" and adding "in areas of higher density of population exist."

Chairman Herrmann discussed Infrequent or Reoccurring Use on page 10. He objected to the idea that one occurrence of someone jumping in the water since 1975 makes it an existing use.

Commissioner Hauser agreed and recommends that the entire paragraph be deleted.

Mr. Ted Heisel commented on page 10, the last paragraph, last sentence under Existing Uses versus Designated Uses. The sentence means if a use is determined to be an existing use any time after or on November 28, 1975, it cannot be removed through this protocol.

Mr. Schroeder suggests that the sentence be changed by deleting "...unless the use is demonstrated to be no longer attainable under the criteria explained on pages 11 through 14 of this document."

Chairman Herrmann discussed Natural Pollutant Sources on page 11. Nowhere in the forms or the protocol does it allow for bacterial analysis of the stream. He recommends that the forms be amended or changed to be able to stipulate what kind of bacterial information is necessary for any of the analysis.

Mr. Schroeder stated that doing so would have prolonged staff getting the protocol back to the Commission. He asked Chairman Herrmann if staff can keep that in mind and come back to the Commission with additional amendments to the form?

Chairman Herrmann responded that staff may take some time for thought to make it both scientifically defensible information, what kind of criteria, and how derived to consider it bacteria.

Mr. Schroeder commented that all six criteria could benefit from this same type of further development in the protocol. Staff can put in that kind of detail for all six criteria.

Chairman Herrmann asked Mr. Schroeder if it is possible to have it for the Commission meeting on September 29, 2004 in Kansas City?

Mr. Schroeder replied he thinks that it is possible if it is only to develop a process for collecting bacterial data and how to represent that on the form. If it expands beyond that, it will take longer.

Commissioner Hauser commented on the second paragraph under Natural Pollutant Sources, page 11. "Where natural sources of bacteria, such as wildlife, are the only cause of noncompliance..." He recommended the word "only" be eliminated. One could argue that it's impossible for natural sources to be the only cause of non-compliance anywhere.

Chairman Herrmann commented on Natural, Ephemeral, Intermittent or Low-Flow Conditions, page 11, "All stream studies must be conducted during the recreational season (April 1<sup>st</sup> to October 31<sup>st</sup>)." He feels there is enough full recorded data, and enough resident data on many of the streams that the studies do not necessarily need to be done during the recreational season.

Mr. Schroeder recommended saying the assessments have to be done during the recreational season unless sufficient evidence has to be shown as to why that's appropriate to conduct a study outside of that period and how the data can show without doubt that these uses either exist or not. It would be left up to the review committee to make some judgement as to whether or not there is a compelling amount of evidence presented.

Chairman Herrmann recommended changing the second sentence of paragraph two to "Stream studies should be conducted during the recreational season (April 1<sup>st</sup> to October 31<sup>st</sup>) unless shown that sufficient evidence can be provided outside this season."

Chairman Herrmann discussed in the same paragraph it says "average" and "maximum." He suggests that the surveys be done during base flow conditions only and use the definition in the Kansas protocol.

Steve McIntosh, Director of the Water Resources Program, had concerns about using the word "normal" flow in a non-standard definition.

Chairman Herrmann stated base flow is what is normally expected of a stream that hasn't had rain fall events influencing it in a reasonable period of time.

Mr. Schroeder suggested going ahead with the base flow definition but recognize that it might limit the ability of staff or others to get out there and do this protocol. If it does, staff can bring it back to the Commission and let them know that is a limiting factor.

Chairman Herrmann discussed depth criteria for boating and canoeing, page 12. The depth criteria should be deleted.

**Commissioner Minton made a motion to have the minimum depth assigned for boating and canoeing be .5 meters during normal flow conditions. Commissioner Hauser seconded the motion. Commissioners Easley, Hauser, Minton, and Chairman Herrmann voted yes. Commissioner Kelly voted no.**

Mr. Trent Stober, MEC Water Resources, in a letter dated September 13, 2004 suggested deleting the last sentence under Hydrologic Modifications, page 12. Commissioner Hauser and Chairman Herrmann agreed.

Chairman Herrmann discussed Natural Physical Features, page 13. He would like "WBCR" changed to "recreational use." That same paragraph is also requiring bacterial determinations and no place in the forms was there any guideline or stipulation for bacterial determinations. He recommended earlier that the forms be amended or changed to be able to stipulate what kind of bacterial information is necessary for any analysis.

Chairman Herrmann discussed Recreation Season, page 15. It was already discussed that a recreational use should be performed during a recreational season. It will be changed to



be consistent with the previous language. That same paragraph should be re-written to say "UAAs aimed at assessing recreational use should be performed during the recreational season defined by rule as between April 1 and October 31. However, UAAs may be performed at any time of the year if sufficient evidence exists to confidently determine the existing and/or the attainment of a use."

Chairman Herrmann discussed Normal Flow Conditions, page 15. Mr. Schroeder reported that this paragraph will be rewritten based on an earlier discussion. They will go back to base flow, what Kansas defined in terms of an appropriate flow for an assessment. This paragraph will be reworded. Chairman Herrmann would also like the last two sentences in that same paragraph deleted. He does not believe that is an appropriate definition.

Chairman Herrmann discussed Points of Observation, page 15. The last two sentences referring to bacterial analysis should be deleted. That was talked about earlier on the expansion of the forms.

Chairman Herrmann discussed the Field Data Sheets for Recreational Use Stream Surveys, page 17. He would like Organization and Position added to the form.

Chairman Herrmann discussed Submittal and Review Procedures, page 20. He would like the first sentence to say "Any interested party may conduct a Use Attainability Analysis for the possible removal, downgrading, or subcategorization of a designated use and submit the report to the department."

Chairman Herrmann stated these suggested revisions will be made and brought to the Clean Water Commission on September 29 in Kansas City for final approval.

Mr. John DeLashmit, US EPA Region 7, mentioned the discussion on boating and canoeing. It could be a little premature because they had to approve the proposed definition of boating and canoeing. While the protocol addressing the secondary contact use could be established, the downgrades to the secondary classification wouldn't be effected for Clean Water Act purposes until the definitions for boating and canoeing are approved.

Mr. Schroeder commented that these are draft definitions that will be going through rulemaking as far as the water quality standards are concerned. While there is a chance those definitions may change, hopefully by the end of the rulemaking process there will be a UAA protocol that is in place that compliments the new standards.

Mr. John Lodderhose, St. Louis Metropolitan Sewer District, commented on the Non-Remedial, Human Caused Conditions, page 12. He would like to see the four bullets from the July 23, 2004 version put back in. It is more closely related to the federal definition.

Mr. Lodderhose also mentioned the Natural Physical Features, page 13. He would like to see the last two sentences deleted because it unnecessarily restricts the use of the national criteria for downgrading a use.

Ms. Caitlyn Peel, St. Louis Homebuilders Association, mentioned she would like to see some of the timelines tightened up. Beginning on page 20 it mentions a complete UAA will be returned to the submitter for revisions and there isn't a timeline. It also says the committee will review for completeness and adequacy and then give it to the director of the Water Protection Program but there isn't a timeline for the Director to make a recommendation or to post it. It gives 50-60 days for the department's designated use recommendation to the Clean Water Commission. Sixty days seems like a long time if it has already been approved by an internal review committee.

Mr. Schroeder responded that 60 days was used because the Commission often only meets once every month.

Mr. Bill Bryan, Attorney General's Office, stated based on some of the things Mr. McIntosh mentioned he is considering suggesting a brief addition to the guidance document that clarifies that what the department is doing here isn't intended to effect the riparian rights of Missouri landowners.

Respectfully Submitted,

Jim Hull  
Director of Staff